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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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NO. 81 6711

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DARRELL WAYNE HILL . . . . . PETITIONER

v.

STATE OF ARKANSAS. . . . . RESPONDENT

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

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# PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner Darrell Wayne Hill [hereafter called Hill], a prisoner serving a sentence of life imprisonment without parole, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

QUESTIONS PRESENTED

1. Whether the search of Petitioner's vehicle violated the requirements of Belton v. New York, ___U.S.___(1981), 69 L.Ed.2d768 and Adams v. Williams, 407U.S.143(1971)?

2. Whether the Arkansas Supreme Court's assumption of facts not contained in the record but within the State's burden of proof in regards suppression of evidence seized without a search warrant violated Petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Whether the trial Court conducted the aggravation - mitigation phase of the trial in such a way as to deny Petitioner the entry into evidence proffered evidence properly allowable under the doctrine of Lockett v. Ohio, 438U.S.586(1978) and Eddings v. Oklahoma, ___U.S.___(1981)?

4. Whether the introduction during the enhancement - aggravation/mitigation phase of the proceedings of evidence of prior convictions based upon pleas of guilty without representation by legal counsel violated the dictates of Baldasar v. Illinois, 446U.S.222(1980)?

## OPINIONS BELOW

The opinion of the Supreme Court of Arkansas affirming Hill's conviction is reported at Hill v. State, ___Ark.___, (February 8, 1982). A copy of the opinion is attached as an exhibit hereto.

## JURISDICTION

The opinion of the Supreme Court of Arkansas, after the denial of a timely rehearing petition, was rendered on March 15, 1982. This Court's jurisdiction is invoked under 28U.S.C., § 1257(3), with Hill asserting here and having asserted below, a deprivation of rights secured by the Constitution of the United States made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly described the place to be searched, and the persons or things to be seized.

Fourteenth Amendment; Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. ... nor shall any State deprive any person of life, liberty, or property, without due process of law ....

Ark.Stat.Ann. §41-1304:

> Mitigating circumstances shall include, but are not limited to the following:
>
> (1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;
>
> (2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;
>
> (3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
>
> (4) the youth of the defendant at the time of the commission of the capigal murder;
>
> (5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;
>
> (6) the defendant has no significant history of prior criminal activity.
> [Acts 1975, No.280, §1304, p. 500.]

## STATEMENT OF THE CASE

On February 7, 1980, a service station located in Pencil Bluff, Montgomery County, Arkansas, was robbed. Its proprietor, Mr. E. L. Ward and a customer, Mr. Donald Teague, were abducted, robbed, and shot. Mr. Teague died instantly from his wound. Mr. Ward was shot several times, but survived.

Later that day, Darrell Wayne Hill was driving a maroon Thunderbird with white license plates with dark lettering in Hot Springs, Arkansas, in neighboring Garland County. He was pulled over by two Hot Springs city police officers for investigation. He exited the vehicle upon request, and joined one officer behind the Thunderbird, the other officer searched the vehicle and found

a paper bag under the seat, containing a revolver and loose coins. The officer displayed the weapon to the officer who was with Hill behind the car, who immediately placed Hill under arrest. Hill was charged with capital felony murder, attempted capital felony murder, and two counts each of aggravated robbery and kidnapping.

The seized items were subsequently placed into evidence.

Hill was subsequently convicted of all six offenses, and sentenced as stated above.

Hill appealed his convictions, raising ten issues on appeal; said appeal was denied in an opinion of the Arkansas Supreme Court dated February 8, 1982; rehearing was denied March 15, 1982.

## REASONS FOR GRANTING THE WRIT

### I. THE STOP AND SEARCH OF PETITIONER AND THE VEHICLE WHICH HE WAS DRIVING WERE ACCOMPLISHED WITHOUT A WARRANT AND OUTSIDE OF ANY WARRANT EXCEPTIONS, INCLUDING SPECIFICALLY "INVESTIGATIVE" STOPS AND SEARCHES PURSUANT TO LAWFUL CUSTODIAL ARREST.

Late in the day that the above stated crimes were committed, Petitioner was stopped by two Hot Springs Police Department Officers on a street in Hot Springs, Arkansas, in neighboring Garland County. The reason for the stop was the similarity of the stopped vehicle and descriptions of the assailant's vehicle broadcast over police radio bands. Said descriptions were of a late model maroon Thunderbird with white license plates with dark lettering.

Petitioner was stopped without any problems. He exited the car upon command. It is not disputed that he was behind the car with one officer when the other officer discovered a sack under the car seat, opened it, found a weapon, displayed the weapon to

the first officer, who then placed Hill under arrest.

Petitioner would ask the Court to note that the trial Court at the conclusion of the suppression hearing made a specific finding of a fact which is uncontrovertible in this situation: i.e., the search could not be justified as necessary to assure and safeguard the safety of the officers; Hill was well outside of any area in which he could have lunged for the weapon had he desired to harm the officers.

Essentially two justifications for this search and seizure have been proposed - an Adams or Terry type of investigative stop and "frisk", or a Belton type of search pursuant to a lawful custodial arrest. See, Adams v. Williams, 407U.S.143 (1972); Terry v. Ohio, 392U.S.1(1968); Belton v. New York, ___U.S.___, 101S.Ct.2860(1981); Chimel v. California, 395U.S. 752(1969).

Several factors place the Hill stop and search beyond these exceptions to the requirement of a search warrant. The search was not necessary to safeguard the officers from harm, under the facts as presented in Court or under the findings of the trial Court. Indeed the Belton Court specifically recognized that the searches authorized therein would not always be acceptable, when the Court stated, at 101S.Ct.2864, that, ". . .articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the are into which an arrestee might reach in order to grab a weapon. . .'"

Further, the Belton Court dealt with a situation where there was no question that the individual was under arrest at

the time of the search. Here, however, the search led to the arrest, not vice versa.

It has been suggested that probable cause to search, or to arrest, existed immediately upon Petitioner's stop and exit from the vehicle, based on the following: the color and make of automobile, which matched the assailant's vehicle; the license plate colors (light with dark lettering), and Hill's physical makeup (medium height, medium build, caucasian, rough face, balding with light colored hair on the sides). The broadcast description of the assailant varied substantially from Hill's actually description in that the clothing was different and the assailant had dark hair (no mention of baldness). The descriptions coincide as to his height, weight and race, and must also coincide with thousands of other average sized white males anywhere around the site of the crime. In essence the opinion of the Arkansas Supreme Court would render white males of thoroughly average build in maroon Thunderbirds in any county adjacent to the site of this crime subject to stop, "investigative" detainment and search of the passenger compartment of their vehicles. It can hardly be countenanced that each of the individuals so treated would be under "custodial" arrest as was the case in, and as reads the language of, the Belton decision.

Was the instant situation an "investigative" stop as that term has been applied in Terry and Adams? First, the search was not needed to safeguard the officers. Second, the stop itself grossly differs from the test as set out in Adams and Terry at 407U.S.146,

> " 'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dan-

> gerous to the officer or others he may conduct a limited protective search for concealed weapons. 392U.S., at 24. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to protective purposes.' "

This was not an investigation of suspicious behavior. This was in essence a dragnet of maroon Thunderbirds in a very wide radius of a crime. No one individual was singled out for suspicion; no person was singled out as armed and dangerous. The cases cited above have in common specific facts, such as the informer's tip in Adams, which caused an individual to be singled out and to be feared as armed. The authority of these cases has been broadened by the Courts below in the Hill matter to cover a grossly different type of fact situation, which would make citizens remote from a crime and driving "suspect" vehicles subject to searches of unprecedented scope, and application. The breadth of the lower Court's decision herein amounts to bootstrapping an Officer's hunch or reasonble cause which might legitimately authorize a stop to a grant of probable cause to search every time such a stop is made.

## II. THE SUPREME COURT OF ARKANSAS ASSUMED FACTS NOT IN EVIDENCE AND WITHIN THE STATE'S BURDEN OF PROOF IN UPHOLDING THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO SUPPRESS.

On appeal of the trial Court's ruling as regards Defendant's motion to suppress the items seized from the vehicle driven by Defendant, Defendant argued several points including the justifiability of the initial stop and the subsequent search and arrest.

During the Arkansas Supreme Court's response to said points argued for reversal, the Court stated that the vehicle driven by

Defendant was an uncommon one in the area in which it was found (Hot Springs, Arkansas, and relied upon said "fact" in reaching its decision. Petitioner has searched the record and finds no such fact or averment contained in the record.

It is a well founded law that warrantless searches are presumed unreasonable and that the State bears the burden of proving sufficient facts to justify a warrantless search and seizure. Coolidge v. New Hampshire, 403U.S.443(1971). Petitioner respectfully submits that the Arkansas Supreme Court's assumption of said fact and reliance thereon was in gross violation of this principle and constitutes an element of its opinion which is so overreading and unfair as to constitute a denial of Petitioner's rights to due process.

III. DEFENDANT WAS DENIED PLACING INTO EVIDENCE TESTIMONY RELEVANT TO MITIGATION OF HIS SENTENCE OF DEATH DURING THE ENHANCEMENT-MITIGATION/AGGRAVATION PHASE OF THE TRIAL.

During the enhancement-aggravation/mitigation phase of the trial Defendant attempted to place into evidence the testimony of Reverend Victor H. Nixon. Reverend Nixon was present to testify in three general areas: reasons for not executing Hill and based on Hill's background, history, and attitudes, and further based upon Reverend Nixon's expert considerations as a professional counsellor and advisor of both victims and perpetrators of violent crimes, and further based upon his expert considerations as a student of the ethical, philosophical and teological bases of the death penalty.

This testimony produced a series of objections by the State based upon relevance and hearsay.

The Court's first ruling on said objections was that any

testimony not relating directly to Hill was not admissable as not within the six specific mitigating factors set out in Arkansas Statutes Annotated §41-1301.

Ignoring Defendant's response that Nixon's general philosophical, historical and religious discussion of the use of the death penalty was the foundation of his opinion as to why Hill should live, the Court denied admission of such foundation as irrelevant to mitigation. Defendant repeatedly avowed that without the explanation of the source and basis of Nixon's expert opinions, his statement of the reasons for not executing Hill could make no sense whatsoever. Nixon could not state the reasons for his conclusion that Hill should live, and the jury was thus denied access to said testimony.

Further, Nixon was not allowed to testify as to the results of his conversation with Hill, being cut off by further relevance and hearsay objections. Said testimony would have revealed to the jury aspects of Hill's background, history and attitudes, and would also have included such factors as prior familial, social and criminal history, Hill's charitable acts, evidences of Hill's attitudes, belief and character and the sources thereof. All such evidence would have revealed to the jury reasons for not executing Hill.

Petitioner submits that the trial Court's rulings denied the applicability of Lockett v. Ohio, 438U.S.586, 57Ltd2d973, 98S.Ct.2954, to the sentencing of Hill to death in the instant case and under applicable Arkansas law. Petitioner cites the Court to the language of Lockett, 438U.S.586, 604, where the Court concluded that the sentencer should be allowed to hear "any aspect of a Defendant's character and record . . . that the Defendant proffers as a basis for a sentence less than death."

This language was recently cited with approval by the Court in Eddings v. Oklahoma, ___U.S.___,(1981).

IV. DURING THE ENHANCEMENT-AGGRAVATION/MITIGATION PHASE OF THE TRIAL, EVIDENCE OF PRIOR CONVICTIONS WAS PLACED INTO EVIDENCE; SAID CONVICTIONS REFERRED TO AND WERE ENTIRELY DEPENDENT UPON PREVIOUS CONVICTIONS ENTERED WITHOUT THE ASSISTANCE OF COUNSEL.

On March 25, 1964 Defendant was convicted of unauthorized use of a motor vehicle after former conviction of a felony and possession of a firearm after former conviction of a felony.

These convictions were proven by the State for purposes of enhancement of sentence over Defendant's objections. No earlier convictions were proven; however, evidence of two earlier convictions was proffered by the State. Said earlier convictions did not contain the requisite showing of representation by counsel and were thus rejected by the Court.

Thus Defendant was prejudiced in two ways. One, the jury was informed of convictions (the pre-196/ convictions) which would otherwise be totally inadmissible for any purpose under the rule of Scott v. Illinois, 440U.S.367, 59L.Ed.383, 99S.Ct. 1158.

Second, the 1968 convictions which were placed into evidence are totally derivative of the earlier convictions obtained without counsel. The simple fact is that it is not a felony for a non-felon to possess a firearm or to engage in unauthorized use of a motor vehicle and that Defendant's status in 1968 as a felon was totally dependent upon and derivative of a procedure in which he was not represented by counsel, in which the Defendant faces conviction ". . . because he does not know how to establish his innocence . . ." Gideon v. Wainwright, 372U.S.335(1963).

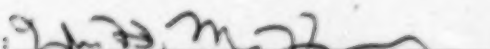
Petitioner submits that entry of the 1968 convictions, as well as informing the jury of the earlier convictions, in the instant proceedings therefore violates the rule of Baldasar v. Illinois, 446U.S.222(1980), regarding the collateral use of uncounselled convictions and their directly derivative enhanced felony convictions as a means of increasing Defendant's punishment herein.

## CONCLUSION

The petition for writ of certiorari to the Supreme Court of Arkansas should be granted and the decision of that Court be reversed. This Court should set this matter for oral argument on the issues outlined above.

Respectfully submitted,

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